

BEFORE THE BURIAL PRESERVATION BOARD
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rules I through V, pertaining to)	PROPOSED ADOPTION AND
repatriation of human skeletal remains)	TRANSFER
and funerary objects and transfer of)	
ARM 2.65.102, 2.65.103, 2.65.104,)	
2.65.105, 2.65.106, 2.65.107, 2.65.108)	
pertaining to protection of burial sites)	
and scientific analysis)	

TO: All Concerned Persons

1. On Friday, November 12, 2010 at 10:00 a.m., the Burial Preservation Board of the State of Montana will hold a public hearing in Room 160 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed adoption and transfer of the above-stated rules.

2. The Burial Preservation Board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m. on Friday, November 5, 2010, to advise us of the nature of the accommodation that you need. Please contact Shannon Lewis, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2032; fax (406) 444-6194; or e-mail slewis@mt.gov.

3. The proposed new rules provide as follows:

NEW RULE I MODEL PROCEDURAL RULES (1) The Burial Preservation Board adopts and incorporates by reference the following model rules, which may be found at <http://sos.mt.gov>:

(a) the Attorney General's model procedural rules ARM 1.3.211 through 1.3.224, and 1.3.226 through 1.3.233, including, as applicable, the appendix of sample forms in effect August 15, 2008; and

(b) the Secretary of State's model rules ARM 1.3.301 and 1.3.302, 1.3.304 and 1.3.305, 1.3.307 through 1.3.309, and 1.3.311 through 1.3.313 in effect August 1, 2008. These rules define model requirements for rulemaking under the Montana Administrative Procedure Act.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-913, 22-3-914, MCA

Statement of Reasonable Necessity: Section 22-3-904, MCA, requires the Burial Preservation Board (board) to adopt rules necessary to provide for filing of repatriation claims and procedures for hearings and resolving multiple claims. The

rules must, at a minimum, address standards of evidence, standards of proof, and criteria for determining lineal descent and cultural affiliation. Hearings may not occur until the board has adopted such rules. The Attorney General's Model Rules cover the procedures for hearings and resolving claims and standards of evidence and proof in detail. The board is proposing to adopt the model forms, as applicable, because all the model forms may not apply to the board's activities. ARM 1.3.201(3) provides that agencies may adopt the Attorney General's model rules by incorporating them by reference.

Section 2-4-201, MCA, requires that each agency adopt rules describing its organization and procedures. The Secretary of State's Model Rules are proposed to be adopted to satisfy this statutory requirement. ARM 1.3.301(3) states that agencies may adopt the Secretary of State's Model Rules by incorporating them by reference.

NEW RULE II AGENCY AND MUSEUM INVENTORY OF CULTURALLY UNIDENTIFIABLE HUMAN SKELETAL REMAINS AND FUNERARY OBJECTS

(1) Culturally unidentifiable human skeletal remains or funerary objects refer to human remains and funerary objects in a museum or in the agency's possession for which no lineal descendant or cultural affiliation has been identified in the inventory process described in 22-3-911, MCA.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-911, MCA

Statement of Reasonable Necessity: Section 22-3-911(1)(c), MCA, directs that an agency or museum shall complete an inventory identifying, among other things, the human skeletal remains or funerary objects that are not clearly identifiable as to cultural affiliation. The Montana Repatriation Act, 22-3-901, MCA, et seq., however, does not explain what culturally unidentifiable means. The new rule provides a definition, which was taken from the federal Native American Graves Protection and Repatriation Act (NAGPRA) regulations, 43 CFR 10.2(e)(2).

NEW RULE III CONTENTS OF A CLAIM FOR REPATRIATION (1) A written claim for repatriation must include a description of the claimant's cultural affiliation to the human skeletal remains or funerary objects and an explanation why an entity possessing the human skeletal remains or funerary objects does not have the right of possession.

(2) A claim failing to provide the above information must be dismissed and returned to the claimant. A claimant may file a revised claim.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: Section 22-3-912, MCA, allows for the filing of claims for repatriation. This statute, however, is unclear regarding what minimum information a claim must contain and what happens if a claim is deemed insufficient.

New Rule III is necessary to provide the information that a claim must have and clarify that a claim omitting the necessary information must be dismissed, but that the claimant may refile their claim.

NEW RULE IV CRITERIA FOR DETERMINING LINEAL DESCENT AND CULTURAL AFFILIATION WHEN REVIEWING A REPATRIATION CLAIM (1) A lineal descendant is an individual tracing their ancestry directly and without interruption by :

(a) means of the traditional kinship system of the appropriate tribal or other cultural group; or

(b) the common law system of decedance to a known individual whose human skeletal remains or funerary objects are being requested under these rules.

(2) Cultural affiliation is a relationship of shared group identity that may be reasonably traced historically or anthropologically between a tribal group and an identifiable earlier tribe.

AUTH: 22-3-904, MCA

IMP: 22-3-903, 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: As noted in the Statement of Reasonable Necessity for New Rule I, the board must adopt rules addressing criteria for determining lineal descent and cultural affiliation. The criteria for a lineal descendent are derived from the NAGPRA regulations, 43 CFR 10.14(b). The board, however, is very interested in receiving comments if individuals believe the board has erred or its criteria are incomplete. The cultural affiliation criteria are wholly derived from the definition of "cultural affiliation" in 22-3-903(6), MCA; the board has not amplified the statutory language. The board believes this definition accurately and adequately provides the criteria for determining cultural affiliation.

NEW RULE V DELAY OF REPATRIATION FOR SCIENTIFIC STUDY (1) If the hearing examiner determines that a possessing entity has provided evidence supporting a good faith effort regarding scientific study, the hearing examiner shall provide a reasonable period of delay, not to exceed 12 months from the date of the hearing examiner's order, to allow completion of the study before repatriation.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-915, MCA

Statement of Reasonable Necessity: Section 22-3-915, MCA, allows the hearing examiner to order a reasonable delay of repatriation if the possessing entity has provided evidence supporting a good faith effort regarding a scientific study. The board strongly believes that a maximum of 12 months is sufficient for such a study. This period is the same maximum period allowed for scientific studies under the Human Skeletal Remains and Burial Site Protection Act, 22-3-801 et seq., MCA.

4. The department proposes to transfer the following rules:

<u>OLD</u>	<u>NEW</u>	
2.65.102	2.65.502	PROTECTION OF SITE
2.65.103	2.65.503	NOTICE AND REPORTING REQUIREMENTS
2.65.104	2.65.506	FIELD REVIEW
2.65.105	2.65.509	REMOVAL OF REMAINS OR BURIAL MATERIALS
2.65.106	2.65.512	DISPOSITION OF REMAINS AND BURIAL MATERIALS
2.65.107	2.65.515	PERMITS FOR SCIENTIFIC ANALYSIS
2.65.108	2.65.518	REPORTS AND BURIAL REGISTRY

Statement of Reasonable Necessity: The board proposes to transfer the above-stated rules in order to more logically arrange the rules.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Shannon Lewis, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2032; fax (406) 444-6194; or e-mail slewis@mt.gov and must be received no later than 5:00 p.m. on Friday, November 12, 2010.

6. Michael Manion, Chief Legal Counsel for the Department of Administration, has been designated to preside over and conduct this hearing.

7. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, email, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Burial Preservation Board's web site at <http://burial.mt.gov>. The Burial Preservation Board strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Burial Preservation Board works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The rules in this notice are the first rules to implement HB 165 (2001). Notification was sent to the sponsor of HB 165 by e-mail that the board was

beginning work on revising the content of the above-stated rules. The bill sponsor was provided a copy of this notice on May 7, 2010.

By: /s/ Reuben Mathias
Reuben Mathias, Chair
Burial Preservation Board

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State October 4, 2010.